LABELS SPECIALIST INDUSTRIES SDN. BHD.

v.

MEDAL SPORTS (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NOOR AHMAD J
[CIVIL SUIT NO: S6-22-506-93]
7 JULY 1997

CIVIL PROCEDURE: *Service - Writ of summons - Action against corporation - Whether service irregular - Whether effected on wrong address - "By leaving it at the registered office of the corporation" - Order 62 r. 4(1)(a) Rules of the High Court 1980 - Section 350 Companies Act 1965 - Meaning and effect - Whether incumbent to leave document at conspicuous part of premises of corporation - Whether must ensure that someone at corporation is aware of document left thereat*

WORDS & PHRASES: *"By leaving" - Order 62 r. 4(1)(a), Rules of the High Court 1980 - Section 350, Companies Act 1965*

This was an appeal against the decision of the learned Senior Assistant Registrar dismissing the appellant's application to set aside a default judgment and an order of damages assessed. The appeal was centred on the contention that both the amended writ of summons ('the writ') and the notice of appointment for the assessment ('the notice') had not been properly served on the appellant. The facts showed that the respondent had sent the writ and the notice by registered post to the appellant, but, instead of sending them to Lot 17487, which was the proper lot number of the appellant's business addresss in Batu Caves, Selangor, the respondent instead addressed them to Lot 17847. The relevant affidavit of service affirmed that the respondent had also left the writ at the appellant's registered address at 7.21 and 7.22, 7th floor, Imbi Plaza, Kuala Lumpur on 15 December 1993 at 11.00 a.m. The affidavit, however, did not elaborate as to the manner in which the writ was served at the said address. Before the learned Judge herein, a question arose as to whether the documents aforesaid had been properly served on the appellant, and if not, whether the appellant, for that reason, ought to be entitled to set aside the default judgment and the order of damages assessed.

Held:

[1] The writ and the notice were sent to the wrong address of the appellant. The correct address should be Lot 17487 (and not Lot 17847), Jalan Dua, Taman Selayang Baru Industrial Area, 68100 Batu Caves, Selangor. The service is therefore irregular.

[2] It is the duty of the respondent to satisfy the Court on the balance of probability that the writ had been properly served on the appellant, that is to say, the writ was left at the said premises in such manner that someone in the registered office of the appellant could be made aware of it. In the absence of such proof, it is not the duty of the appellant to prove that the appellant was not aware of the amended writ.

[3] The expression 'by leaving' in O.62 r. 4(1)(a) of the RHC and in s. 350 of the Companies Act connotes the need on the part of the person who leaves the writ to take the necessary steps to ensure that at least some one in the corporation is made aware of the document left thereat. The expression, thus, does not mean by simply leaving it there but at least by leaving it at some conspicious part of the premises of the corporation.

[4] The appellant in this case has denied knowledge of the alleged service. The affidavit of service, on its part, lacks precision as to the manner the amended writ was left at the premises. In the circumstances, the Court cannot be satisfied on the balance of probability that the service had been properly effected. The service being irregular the appellant is therefore entitled to have the judgment in default and the order of damages assessed set aside.

[Appeal allowed. Appellant to file defence in 14 days.]

Legislation referred to:
Rules of the High Court 1980, O. 62 r. 4(1)(a)
Companies Act 1965, s. 350

For the appellant - Junaidah Hassan (T.F. Liow with her); Liow Teik Foong & Partners
For the respondent - K.S. Chin; M/s. Darshan Chong & Co.

JUDGMENT

Mohd Noor Ahmad J:

The appellant appealed against the decision of the learned Senior Assistant Registrar which dismissed the appellant's application to set aside the judgment in default of 5 January 1994 and the order of damages assessed made on 15 May 1995.

It is not disputed that the Amended Writ of Summons and the Notice of Appointment for the Assessment were sent by registered post to the appellant's place of business at Lot 17847, Jalan Dua, Taman Selayang Baru Industrial Area, 68100 Batu Caves, Selangor. Also, the Amended Writ of Summons was alleged to have been left at the appellant's registered address at 7.21 & 7.22,

7th Floor, Imbi Plaza, Jalan Imbi, 55100 Kuala Lumpur. The appellant did neither enter an appearance nor attend the Assessment proceeding. Hence, the default judgment order of damages assessed were made against the appellant.

From the affidavit evidence, I am satisfied that the Amended Writ of Summons and the Notice of Appointment for the Assessment were sent to the wrong address of the appellant. The correct address should be at Lot 17487, Jalan Dua, Taman Selayang Baru Industrial Area, 68100 Batu Caves, Selangor. Therefore, the service is irregular. However, I have to consider whether the service of the Amended Writ of Summons at the appellant's registered address on 15 December 1993 is regular.

Order 62 r. 4(1)(a) of the Rules of the High Court 1980 provides:

> Where an action is against a corporation, the writ may be served:
>
> (a) by leaving a copy of it at the registered office (if any) of the corporation;

And s. 350 of the Companies Act 1965 states:

> A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

On the facts, I have to consider the true meaning of the expression "by leaving". The C*oncise Oxford Dictionary* 9th Edn., defines the verb 'leave' as deposit or entrust (a thing) to be attended to, collected or delivered etc. in one's absence (left a message with his secretary). To my mind, from the definition the expression "by leaving" connotes the need on the part of the person who leaves the thing to take the necessary steps to ensure that the person for whom the thing is left in his absence is made aware of the thing left. That being the case, especially where O. 62 r. 4(1)(a) of the Rules and s. 350 of the Act deal with the service of writ/documents on corporation/company, it is incumbent upon the person who effects the service to take the necessary steps to ensure that at least someone in the corporation/company is made aware of the writ/document left thereat. Therefore, the expression 'by leaving' does not mean by simply leaving it there but at least by leaving it at some conspicuous part of the premises of the corporation/company. In other words, by simply leaving a writ/document is different from serving a writ/document by leaving.

One T.H. Tan simply affirmed in the affidavit of service (Encl. (3)) that the Amended Writ of Summons was served on the appellant on 15 December 1993 at 11 a.m. by leaving it at its registered address. He did not elaborate in what manner it was left there so as to ensure that at least someone in the registered office of the appellant could be made aware of the Amended Writ being left

thereat. It is the duty of the respondent to satisfy the Court on the balance of probability that the Amended Writ had been properly served on the appellant, that is to say, the Amended Writ was left at the said premises in such a manner that someone in the registered office of the appellant could be made aware of it. In the absence of such proof, it is not the duty of the appellant to prove that the appellant was not aware of the Amended Writ. In fact, the appellant denied knowledge of such service. As the affidavit of service lacks precision in the manner the Amended Writ was left at the said premises, I am not satisfied on the balance of probability that the service had been properly effected. Therefore, the service is irregular and the appellant is entitled to have the judgment in default and the order of damages assessed set aside on this ground alone.

However, if I am wrong on this point, I am satisfied on the balance of probability that the appellant has demonstrated a *prima facie* defence on the issue whether the respondent is entitled to claim damages on the contract for which the respondent had decided to proceed with, despite the fact that the appellant had breached the term on the delivery of vacant possession before 31 January 1993 (Clause 6 in ex. A-5 Encl. (17)) coupled with the fact that from the affidavits filed by the parties there is insufficient evidence to determine whether the respondent itself had been in breach of the obligation to deposit the balance of the purchase price with the solicitors within the period as stipulated in cl. 2, especially on the sum of RM492,437.47 which was paid to the appellant's solicitors only on 19 July 1993 (see ex. A-6 and A-8 in Encl. (18)). Although the appellant had not pleaded this issue in the proposed Statement of Defence, it is trite that the appellant may raise it at this juncture because the appellant is always entitled to apply for the amendment of the defence at any time before the hearing.

Therefore, the appeal is allowed with costs here and below. The order of the Senior Assistant Registrar is set aside. Further, the judgment in default and the order of damages assessed are hereby set aside, and the Statement of Defence is to be filed within 14 days from the date of this judgment.

Reported by WA Sharif